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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

No. 95-465

LAGUNA GATUNA, INC.,
Petitioner,

v.

BROWNER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE AMERICAN FOREST & PAPER ASSOCIATION, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amicus curiae the American Forest & Paper Association, Inc. ("AF&PA") is a non-profit trade association whose member companies grow, harvest, and process wood and wood fiber, and manufacture pulp, paper, and paperboard products and solid wood products. Its member companies account for over 8% of total U.S. manufacturing output. *Amicus curiae* the National Association of Home Builders of the United States ("NAHB") represents 185,000 builders and associate members (*e.g.*, land planners, land developers, industrial developers) organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico.

Amicus AF&PA's member companies own or lease extensive tracts of land used for large manufacturing facilities or for the production of timber, including approximately 71 million acres of forest land. In addition, these companies rely on timber from the over 250 million acres of private, nonindustrial forest land. These lands contain many isolated areas where topographical depressions occasionally collect rainfall runoff that, under current U.S. Environmental Protection Agency ("EPA") policy, may be considered "waters of the United States." These companies also own and operate hundreds of man-made surface impoundments, used as water storage, treatment, or evaporation basins; cooling water or fire protection water ponds; log storage ponds; surface runoff sedimentation ponds; and the like.

Many of *amicus* NAHB's members engage in grading and construction on undeveloped land and often encounter questions about whether a particular area is regulated as a "wetland." They also construct temporary or permanent storm water runoff retention ponds, ornamental ponds, drainage ditches, and the like which may be considered "waters of the United States" under certain circumstances.

Because EPA's definition of "waters of the United States" is so broad and so vague that it could apply to virtually any property, under the Tenth Circuit's decision almost any of the *amici's* members (and countless other landowners) could be subjected to *ad hoc* EPA determinations of Clean Water Act ("CWA") jurisdiction that will escape judicial review unless the landowner risks harsh civil or criminal penalties.

SUMMARY OF ARGUMENT

The decision below would allow vast areas of land and millions of property owners across the country to be held captive to onerous regulatory restrictions

without the possibility of judicial review. If allowed to stand, the decision would permit EPA and the U.S. Army Corps of Engineers ("Corps") to deny landowners the productive use of their property, without any hearing whatsoever, unless the landowners elect to ignore the agencies' restrictions on land use and accept the risk of severe civil and criminal punishment. Unfortunately for property owners, by "rolling the dice" and disregarding the orders of EPA or the Corps, landowners not only significantly increase their chances of prosecution at the hands of the agencies, but also concomitantly increase the gravity of the penalties (including criminal sanctions) which may be levied against them.

The severe curtailment of property owners' rights condoned in the decision below, without the possibility of judicial review, clearly constitutes a deprivation of due process. This constitutional transgression is magnified by the *ad hoc* and unpredictable nature of assertions of jurisdiction by EPA and the Corps. Additionally, as a statutory matter, the preclusion of judicial review giving rise to this deprivation is unfounded in the Clean Water Act itself. Simply put, the issuance of a cease-and-desist order by EPA or the Corps pursuant to their wetlands authority constitutes a firm adjudication of a landowners' rights, yet the decision below would summarily deprive a landowner of the constitutional and statutory right to judicial review of this admittedly final adjudicatory determination. This Court's intercession is necessary to ensure that property owners are not stripped of their rights in derogation of both the Clean Water Act and the due process guarantee of the Constitution.

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO PROTECT THE DUE PROCESS RIGHTS OF COUNTLESS PRIVATE PROPERTY OWNERS

Seminal precedent from this Court holds that, pursuant to the Fifth Amendment of the Constitution, individuals must receive notice and an opportunity to be heard before the government may deprive them of property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In this case, the actual determination by EPA of its jurisdiction under the Clean Water Act amounted to an *ad hoc* adjudication of the Petitioner's property rights. Nevertheless, under the Tenth Circuit's decision, the only way Petitioner could seek review of this determination would entail subjecting the Petitioner to the possibility of severe criminal and civil punishment.[1] This deprivation of constitutionally-protected property rights -- in the absence of judicial review -- simply does not meet the minimum requirements of due process.[2]

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1 Other courts have reached a different conclusion on this point. *See, e.g., Stoeco Development, Ltd. v. Department of the Army Corps of Engineers*, 701 F. Supp. 1075 (D.N.J. 1988), *appeal dismissed*, 879 F.2d 860 (3d Cir. 1989) (considering a challenge brought by a developer to a cease and desist order issued by the Corps pursuant to its wetlands jurisdiction, before any penalties were sought or imposed); *Swanson v. United States*, 600 F. Supp. 802 (D. Idaho 1985), *aff'd*, 789 F.2d 1368 (9th Cir. 1986).

2 *See Ex Parte Young*, 209 U.S. 123, 147 (1908) (where "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts ...," "a

The cease and desist order issued in this case included a determination by EPA that a sinkhole known as Laguna Gatuna was a "water of the United States" under the CWA. 33 U.S.C. § 1362(7) (1986). Such a determination subjects a property owner to the full panoply of CWA requirements. In this case, Petitioner was required to cease discharging to its own evaporation basin and, consequently, was driven out of business.

While Petitioner suffered particularly severe consequences as a result of EPA's assertion of jurisdiction, such assertions typically have significant consequences. Indeed, the mere identification of an area as a "water of the United States" severely encumbers the property. For example, an owner of land determined by EPA or the Corps to be a water of the United States is not only stripped of the right to freely landscape, cultivate, and develop the area, but may also be prevented from securing bank loans or obtaining title insurance for the property or otherwise managing the property as a productive asset. *See, e.g., Rueth v. EPA,* 13 F.3d 227, 230 (7th Cir. 1993) (noting the substantial curtailment of a landowner's property interest after EPA's exercise of "water of the United States" jurisdiction). A permit to use the land as desired may be denied outright, or it may be issued only after the landowner agrees to costly "mitigation" measures.[3]

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law which ... impos[es] such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional").

3 *See, e.g.,* 60 Fed. Reg. 58605, 58607 (1995). The government may argue that a person may avoid enforcement and challenge EPA's jurisdictional determination after applying for a permit to discharge pollutants under CWA sections 402 or 404, 33 U.S.C. §§ 1342, 1344 (1986 and

Petitioner has excellent reasons for believing that its treatment basin is not a "water of the United States": the intrastate sinkhole is not hydrologically connected to any other water body. More significantly, at Petitioner's request in 1987, EPA's Office of Regional Counsel declared in writing that the Laguna Gatuna sinkhole was *not* a water of the United States. Nevertheless, according to the Tenth Circuit decision, Petitioner's only recourse with respect to EPA's reversal of its original position is to defy EPA's cease and desist order and subject itself to the possibility of grave civil and criminal penalties.[4] The *amici* are concerned that their members, too, could be forced to make a Hobson's choice between defying a compliance order to obtain review of an EPA determination, or acquiescing in the order, which would require them to forfeit substantial property interests without judicial review.

Supp. 1995). While such an appeal provides an opportunity to challenge either the denial of the issuance of the permit or the terms of the permit upon issuance, it is not clear that this forum provides the applicant who does not believe he needs a permit any real opportunity to challenge the underlying subjective determination as to whether a "water of the United States" exists in the first place.

4 A violation of the Clean Water Act can result in a civil penalty of $25,000 a day, a criminal penalty of up to $25,000 per day plus one year in prison, or administrative penalties of up to $125,000 per violation. 33 U.S.C. § 1319(c)(1), (d) & (g). Moreover, a "knowing" violation of the Act is further punishable by up to $50,000 per day, plus three years in prison. 33 U.S.C. § 1319(c)(2). A violation may be "knowing" even though the discharger was unaware its actions were regulated. *United States v. Weitzenhoff*, 1 F.3d 1523 (9th Cir. 1993), *cert. denied*, ___ U.S. ___ (1995).

This fundamentally unfair situation is especially deserving of this Court's review in light of the broad implications of the Tenth Circuit's decision. The enforcement provisions at issue apply not only to discharges of wastewater as in this case, but also to discharges of dredged or fill material, which are subject to the Corps permit program under CWA section 404, 33 U.S.C. § 1344 (1986 and Supp. 1995). Both types of discharges are regulated only when they are to "waters of the United States" (which this Court has held also include wetlands, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)).[5]

EPA has defined "waters of the United States" so broadly as to include any isolated wetland or "other water" with no connection to navigable-in-fact waters. *See* 40 C.F.R. § 122.2 (1994). In fact, EPA asserts and courts have agreed that "waters of the United States" may include isolated areas that are only seasonally or ephemerally wet. *See, e.g., Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986). Rainwater collecting on dry land for a few days may be enough to create a regulated wetland. *See Leslie Salt Co. v. United States*, 700 F. Supp. 476, 487 (N.D. Cal. 1988), *rev'd*, 896 F.2d 354 (9th Cir. 1990) ("*Leslie Salt II*"), *cert. denied*, 498 U.S. 1126 (1991). The term also can encompass man-made impoundments. *See, e.g., Leslie Salt II,* 896 F.2d at 358-60. Moreover,

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5 For additional explanation of the roles of EPA and the Corps, *see* Memorandum of Agreement Between the Dept. of the Army and the Environmental Protection Agency concerning Federal Enforcement for the Section 404 Program of the Clean Water Act, Jan. 19, 1989, *reprinted in* 19 Env. L. Rep. 35183 ("Enforcement Memorandum of Agreement") and *United States v. Mills*, 817 F. Supp. 1546, 1551 (N.D. Fla. 1993), *aff'd*, 36 F.3d 1052 (11th Cir. 1994), *cert. denied*, ___ U.S. ___ (1995).

according to EPA, the only connection to interstate commerce that is required for a "water" to be within its regulatory jurisdiction is that the area is or could potentially be used by migratory birds or endangered species. *See, e.g., Hoffman Homes, Inc. v. EPA,* 999 F.2d 256, 261 (7th Cir. 1993).

Consequently, under this definition, almost any "water" could be determined by EPA to be within its regulatory jurisdiction. Millions of acres of *land*[6] and millions of land owners are potentially subject to EPA's jurisdiction under this regulatory scheme. Moreover, EPA regulates virtually all activities in wetlands and other "waters" that involve any kind of soil movement (even movement of soil on a vehicle's treads).[7]

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6 Under present wetlands determination policy, approximately 111 million acres of land in the United States could be affected as regulated wetlands. *Water Pollution*, 22 Env't Rep. (BNA) 2169, 2194, January 24, 1992. Millions of additional acres of normally dry washes, playas, and other areas are also potentially regulated as "waters of the U.S.," as in *Quivira Mining, supra.* The Corps conducted a study that identified over 8 million isolated depressions of less than one-half acre that could be considered jurisdictional wetlands under the "migratory bird test." U.S. Army Corps of Engineers, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995).

7 The term "discharge" may include dredging an area, grading or road construction, mechanical clearing of land, or even cutting a ditch for the purpose of draining an area. *See* 33 C.F.R. §§ 323.2-323.4 (1994) and, *e.g., Avoyelles Sportman's League, Inc. v. Alexander,* 473 F. Supp. 525 (W.D. La. 1979). *See also* 57 Fed. Reg. 26,894, 26,896 (1992).

Thus, countless land owners are subject, under the decision below, to *ad hoc*, unreviewable EPA determinations that property they own is, despite its appearance and contrary to common sense, really a "water of the United States," and that activities on those lands are therefore subject to federal regulation. Moreover, under the decision below, any of these land owners could, like Laguna Gatuna, make substantial investments in and improvements to their property in reliance on the good faith belief -- or on EPA's own representations -- that an area is not a "water of the United States," only to have EPA subsequently change its position and destroy these expectations, without any reasonable opportunity for judicial review.

II. AVAILABILITY OF JUDICIAL REVIEW IN A SUBSEQUENT ACTION TO RECOVER PENALTIES DOES NOT SATISFY DUE PROCESS

The Tenth Circuit assumed that judicial review of EPA's assertion of Clean Water Act jurisdiction could be had after the EPA imposed an administrative penalty or the United States sought a civil or criminal penalty. The court then concluded this was sufficient to pass constitutional muster. It is unfortunately not clear that a defendant charged with violating an EPA enforcement order will be able to challenge the jurisdictional finding on which the order was based. *See United States v. Mills*, 817 F. Supp. at 1548-49 (refusing to disturb criminal convictions, where Eleventh Circuit had previously affirmed convictions even though criminal defendants were not allowed to put on evidence that the area in question was not a "wetland" at the time of their filling). Even if such a subsequent opportunity for review were clear, however, it would not satisfy the Due Process Clause in light of the severe *and aggravated* penalties that can and often do accompany violation of an EPA or Corps enforcement order.

As noted above, CWA section 309 provides severe civil, criminal, and administrative penalties for discharging to a "water of the United States" without a permit. These penalties are not just theoretical: EPA's wetlands program "places a high priority on enforcement against unpermitted discharges," and there are many examples of EPA civil and criminal enforcement against companies and individuals discharging into areas they did not believe to be "waters of the United States." EPA Enforcement Accomplishments Report FY 1993, April 1994 at 3-17, 3-17-3-19; *see also, e.g., U.S. v. Ellen*, 961 F.2d 462 (4th Cir. 1992), *cert. denied*, ___ U.S. ___ (1992). For example, this Court recently denied a petition for *certiorari* in a case where, although the district court noted "the disturbing implications of the expansive" Corps definition of "waters of the United States," nevertheless a father and son were each sentenced to 21 months incarceration for placing fill material on a lot that "does not have the appearance of what most lay people think of as a 'wetland.'" *Mills*, 817 F. Supp. at 1548.

In addition to these serious penalties, EPA may require companies to restore wetlands following a determination by EPA that a piece of property is a "water of the United States," *see, e.g., United States v. Cumberland Farms of Conn.*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); and in fact EPA "enforcement efforts . . . generally seek removal of the fill and restoration of the site."[8] Thus, a person who in good faith believes his activity is not regulated under the CWA still faces possible imprisonment and costly

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8 EPA Report to Congress on Clean Water Act Enforcement Mechanisms, pursuant to P.L. 100-4, Section 314(b), May 11, 1990 at 22; *see also United States v. Jones*, No. 5-90-0216 (D. Md. filed May 30, 1990).

restoration requirements if he chooses to challenge EPA's assertion of jurisdiction by violating the compliance order.

In fact, a person who violates a restoration or compliance order to obtain judicial review of an EPA determination subjects himself both to *increased* likelihood of enforcement action and *increased* sanctions for "knowing" violations. As explained by F. Henry Habicht II, former Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice, "EPA seeks cooperation and voluntary compliance; continued violations in the face of repeated notices from EPA are therefore viewed especially seriously. Violations after receipt of notice also help [to] establish the knowledge element of environmental crimes." Habicht, "The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side," 17 Env. L. Rep. 10478, 10481 (December 1987). This policy makes it more likely that a company violating a compliance or restoration order would be prosecuted for the more severe "knowing" violation of the CWA, punishable by imprisonment for up to three years under 33 U.S.C. § 1319(c)(2).[9]

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9 *See, e.g., United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989) (company and senior vice-president convicted for continuing to clear land after receipt of notice from the Army Corps of Engineers that property was regulated wetland); *United States v. Pozsgai*, 31 Env't Rep. Cas. 1230 (E.D. Pa. Jan. 8, 1990), *aff'd*, 897 F.2d 524 (3d Cir. 1990) (Table), *cert. denied*, 498 U.S. 812 (1990) (individual sentenced to three years imprisonment and fined $200,000 for knowingly filling a wetland without a permit after warnings and Corps cease-and-desist order).

The violation of a compliance order will also typically result in *increased* civil or criminal penalties. *See, e.g.*, Federal Sentencing Guidelines §2Q1.3, note 8 (upward departure in a pollution case may be warranted where defendant "has failed to comply with an administrative order"); EPA's "Revised Interim Clean Water Act Settlement Penalty Policy," March 1, 1995, *reprinted in* 25 Env. L. Rep. 35618 (failure to comply with an EPA administrative order is a basis for increasing the gravity component of a civil penalty by up to 150 percent). In fact, it could be argued that violation of such an order represents a separate violation of the CWA, punishable by a penalty of $25,000 per day in addition to the $25,000 per day penalty for the underlying violation of discharging without a permit. *See* CWA § 309(d), 33 U.S.C. § 1319(d).

While the penalties are substantial, there is no "good faith" defense in a civil or criminal prosecution under the CWA, even though the defendant may have had a reasonable belief that his property fell outside CWA jurisdiction. In fact, in most of the reported cases involving criminal prosecution for filling a wetland, the defendant claimed that the particular area in question did not fall within the definition of "waters of the United States." This is exactly the type of situation that this Court found to deprive a person, as a practical matter, of the right to judicial review in *Ex Parte Young*.

III. ORDERS SUCH AS THIS ONE CONSTITUTE BINDING, SUBJECTIVE ADJUDICATIONS OF CLEAN WATER ACT JURISDICTION

Because the definition of "waters of the United States" is fundamentally unclear, and because EPA makes such determinations on a case-by-case basis, companies such as those represented by *amici* have no way of knowing whether their property and their

activities on that property are covered by the Clean Water Act.[10]

Thus, issuance of an administrative order asserting CWA jurisdiction and ordering a property owner to cease activity represents, for that property owner, an adjudication of the often-uncertain question of whether CWA jurisdiction extends to his activities. In this way, an order like the one at issue here differs from an order to cease exceeding discharge permit effluent limitations, for example (or to cease constructing a source of air pollutants without a construction permit). In those cases, there is no question that the federal law applies to the activity, and no case-by-case determinations of jurisdiction are involved.

EPA has even acknowledged that its determinations regarding wetlands and "waters of the United States" are undertaken on a case-by-case and often inconsistent basis. For example, in the preamble to its National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations, EPA Region VI set out a list of factors to be considered in determining whether certain "playas" are "waters of the United States." 58 Fed. Reg. 7610, 7621 (1993). EPA also stated, however, that the factors "are neither exclusive nor regulatory; they are simply

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10 As noted above, *supra* pp. 7-8, almost any activity can constitute a "discharge," and the term "water of the United States" can mean, in EPA's view, almost any area that is ever wet. At least one court has questioned the constitutionality of imposing penalties where a person of common intelligence could not ascertain that the Clean Water Act "prohibition applies to clean fill dirt placed onto a waterfront lot." *Mills,* 817 F. Supp. at 1554.

examples of the sort of factors EPA will *probably* apply in making individual determinations." *Id.* (emphasis added). EPA adds that "[t]here are various types of commerce which may be affected by the degradation of many playa lakes, but EPA has to date asserted jurisdiction over them only on a case-by-case basis, generally in the context of enforcement actions." *Id.* at 7620.

Similarly, courts have recognized the substantial technical inconsistency associated with wetlands determinations. In *United States v. Ellen*, for example, the court addressed the delineation of "waters of the United States" by EPA and the Corps, and recognized that "[t]he absence of a uniform federal methodology resulted in inconsistent wetlands determinations for similar areas."[11]

Both EPA and the Corps have acknowledged the significant uncertainty accompanying decisions to assert CWA jurisdiction over wetlands.[12] In its 1990 Report

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11 961 F.2d 462, 465 (4th Cir. 1992) (notwithstanding inconsistencies in wetland determinations, defendant convicted of five felony counts for filling wetlands despite Corps' cease and desist order).

12 Since 1987, EPA and the Corps have employed three distinct wetlands delineation manuals for the identification of regulated wetlands. *See, e.g., Ellen,* 961 F.2d at 464-65; Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer,* 73 Neb. L. Rev. 163, 172-73 (1994). This dispute over the appropriate manual for use in wetlands determinations involves more than mere procedural flip-flopping. Which manual is used to identify and delineate wetlands can make a great difference in the amount of land considered to be wetlands. Lamunyon, *supra,* 73 Neb. L. Rev. at 173-74; National Research Council, *Wetlands:*

to Congress, *supra* n. 8, EPA stated that: "The agencies' differing interpretations of issues related to the geographic jurisdiction of section 404 or whether a particular activity is regulated or has been authorized, have hampered section 404 enforcement." *Id.* at 20; *see also* 58 Fed. Reg. 4995 (1993); 56 Fed. Reg. 40,446, 40,449 (1991). Congress also has recently observed that "EPA has not consistently applied the regulatory definition of navigable waters, creating uncertainty for the regulated community." House Comm. on Transp. and Infrastructure, H.R. Rep. No. 112, 104th Cong., 1st Sess. 147 (1995).

Because of the vague and confusing criteria for determining whether CWA prohibitions apply to a given activity, and the government's application of those criteria on a case-by-case basis, a compliance order issued under CWA section 309(a), 33 U.S.C. § 1319(a) (1986), is more than simply an order to cease violating the law. It includes, both implicitly and explicitly, an agency determination that the particular facts of that case bring the activity within CWA jurisdiction.[13] Recognizing this, on January 19, 1989, EPA and the Corps entered into a "Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the

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Characteristics and Boundaries (1995) at 77-78 ("NRC Report").

13 *See, e.g., Leslie Salt II,* 896 F.2d at 360 (even where the Corps has created an exemption from its wetlands jurisdiction for certain "waters," "those waters are subject to such jurisdiction on a 'case-by-case' basis of review"); *United States v. Torres,* 656 F. Supp. 251, 254 (D.P.R. 1987), *aff'd,* 826 F.2d 151 (1st Cir. 1987) ("the Corps usually works on a case-by-case basis in determining whether a certain area is a wetland").

Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act" (*reprinted in* 19 Env. L. Rep. 35181). That document not only acknowledges that an agency determination of jurisdiction is a necessary part of any enforcement action; it also recognizes that such a jurisdictional decision is a final, binding agency action: "Case-specific determinations made pursuant to the terms of this [Memorandum of Agreement] will be binding on the Government and represent the Government's position in any subsequent Federal action or litigation regarding the case." *Id. See also* 33 C.F.R. § 320.1(a)(6) (1994) (authorizing Corps district engineers to issue "formal determinations concerning the applicability of the Clean Water Act" which "shall constitute a Corps final agency action"). In light of the binding nature and serious consequences of jurisdictional determinations, the Tenth Circuit was unwarranted in concluding, without any real analysis, that the adjudications of Clean Water Act jurisdiction provided for in these governmental procedures are exempt from review despite the strong presumption of reviewability of federal agency actions under *Abbott Lab. v. Gardner*, 387 U.S. 136, 140-41 (1967).

IV. THE STATUTORY ANALYSIS ADOPTED BY THE TENTH CIRCUIT RESTS ON AN UNWARRANTED INTERPRETATION OF JUDICIAL REVIEW UNDER ENVIRONMENTAL LAWS AND IS INCONSISTENT WITH A DECISION OF THE EIGHTH CIRCUIT

Laguna Gatuna's petition for *certiorari* showed how inappropriate it was for the Tenth Circuit to infer congressional intent to shield CWA enforcement orders from judicial review. Laguna Gatuna could have gone further, however, to show that the cases relied on by the Tenth Circuit are based on faulty analogies. The Tenth

Circuit relies on a decision from the Court of Appeals for the Fourth Circuit, *Southern Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990).[14] The *Southern Pines* court in turn based its conclusion in part on cases examining "pre-enforcement" review in the context of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Clean Air Act ("CAA"). *Id.* at 716. Reliance on this approach, however, is inappropriate for several reasons.[15]

Most importantly, at least one court has questioned whether EPA orders under CERCLA would be constitutional if there were not a meaningful

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14 The Tenth Circuit also relied upon a another decision following *Southern Pines Assocs., Rueth v. EPA.* Additionally, the court relied on *Southern Ohio Coal Co. v. Office of Surface Mining,* 20 F.3d 1418 (6th Cir. 1994), *cert. denied,* ___ U.S. ___ (1994). That case is distinguishable from the instant case insofar as EPA had only threatened to issue a compliance order and had not yet done so. Moreover, that case involved discharges to the Ohio River, clearly a "water of the United States," and consequently did not involve a challenge to EPA's jurisdictional determination of whether or not a "water of the United States" was involved.

15 CERCLA was enacted in 1980, eight years after the relevant provisions of the Clean Water Act. CERCLA is therefore hardly an indication of inferred congressional intent in the Clean Water Act. In addition, although CERCLA initially did not affirmatively grant or deny judicial review of pre-enforcement clean-up orders, Congress subsequently amended CERCLA in 1986 to include a provision which *specifically precludes* federal review of pre-enforcement remedial actions. 42 U.S.C. § 9613(h) (1995).

opportunity to challenge such orders without penalty. *Solid State Circuits v. EPA,* 812 F.2d 383 (8th Cir. 1987). The *Solid State Circuits* court addressed the constitutionality of treble damages for non-compliance with EPA clean-up orders under CERCLA. Specifically, the Eighth Circuit held that CERCLA's clean-up order scheme may pass constitutional muster if it "may be interpreted so that no penalty is imposed if the challenging party has reasonable grounds to contest the *validity or applicability* of an administrative order." *Id.* at 390 (emphasis added). The court concluded that, because CERCLA provides an exemption from treble damages for parties bringing good-faith challenges to remediation orders, the CERCLA scheme satisfied the minimum elements of due process. *Id.* at 391. In other words, the court found the CERCLA treble damage provision constitutional because it allows an individual to violate a pre-enforcement order without the threat of treble damages, in the good-faith belief that the order is improper, in order to obtain judicial review of the administrative action.

If this standard were applied to the Clean Water Act, as interpreted by the Tenth Circuit, the Clean Water Act would fail: a company violating a cease and desist order to obtain judicial review, *even in the good-faith belief that its property is not subject to Clean Water Act jurisdiction,* is entirely subject to the full range of grave criminal and civil penalties available under the statute. The CERCLA analogy relied on by the Tenth Circuit therefore not only is inapposite, but actually cuts against the unreviewable deprivation of property rights allowed in the decision below.

Finally, CERCLA Section 106 does not contain the threat of a criminal penalty, in contrast to the Clean Water Act. If the treble damages hinging on non-compliance with the CERCLA pre-enforcement order in *Solid State Circuits* were sufficient to trigger the need for a good-faith exemption to preserve constitutionality,

then certainly the criminal sanctions available for non-compliance with enforcement orders under the CWA demand due process at the time of the orders' issuance.[16]

CONCLUSION

Because EPA's definition of "waters of the United States" is so broad and so vague that it could apply to virtually any property, the Tenth Circuit's decision has the potential to affect millions of acres of property and millions of landowners. This court's intercession is needed to guarantee that private property owners such as *amici* can obtain judicial review of EPA's case-by-case determinations of their rights, without having to risk severe criminal and civil liability. The fact that disobeying an EPA order increases the likely size of penalties and the likelihood of criminal prosecution, coupled with the lack of a good-faith defense for landowners, renders post-enforcement review of these assertions of federal jurisdiction unavailable as a practical matter.

Far from interfering with the government's effective enforcement of the CWA, as claimed by the

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16 Both the Fourth Circuit and the Tenth Circuit also inappropriately rely on provisions of the Clean Air Act in holding that the Clean Water Act precludes judicial review in this instance. A compliance order under the Clean Air Act does not involve the same case-by-case factual determination of jurisdiction as is the case under the Clean Water Act for discharges to a "water of the United States." No subjective determination of jurisdiction by EPA is required to initiate enforcement action under the Clean Air Act, which may be based on violation of specific regulatory provisions or construction of defined sources of air pollution. *See, e.g.*, 42 U.S.C. § 7413(c)(1) (1995).

Tenth Circuit, providing for judicial review of jurisdictional determinations would probably enhance compliance. In those cases where there is a genuine controversy about CWA jurisdiction, EPA or the Corps would simply have to justify their final, "binding" determinations earlier in the process, when a compliance order is challenged; in most cases, though, enforcement orders would still be complied with summarily, as they are now. In fact, the availability of judicial review would likely reduce the admitted inconsistencies in jurisdictional determinations and improve public confidence in the system, resulting in higher levels of compliance. As the National Research Council recently observed in discussing jurisdictional determinations under the CWA, "Citizens lose faith in a legal system that is administered inconsistently even as it imposes penalties for noncompliance." *NRC Report, supra* n. 12, at 185.

Respectfully submitted,

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